



**Statement for the Record  
of David Bier of the Cato Institute\***  
**Submitted to House Committee on the Judiciary**  
**Markup of**  
**“H.R. 391 - Asylum Reform and Border Protection Act”**  
**July 26, 2017**

The Asylum Reform and Border Protection Act (H.R. 391) would undermine the individual rights of people fleeing persecution and violence to seek asylum in the United States. The bill would obliterate the current asylum standards and now require asylum seekers to prove their claims to an impossible degree immediately upon their arrival at the border—without access to the documents or witnesses that they would need to do so. The government would then promptly deport without a hearing before an immigration judge those who fail this unattainable requirement, possibly to endure violence or persecution.

The authors claim that this radical change is necessary due to an unprecedented surge of asylum applicants. In the 1990s, however, a similar surge of asylum seekers arrived in the United States, and Congress adopted much less severe reforms than those proposed in this bill. Even assuming that the applicants are submitting asylum applications for the sole purpose of gaining entrance to the United States, the bill does nothing to address the underlying cause of the problem: the lack of a legal alternative to migrate. As long as legal immigration remains impossible for lesser-skilled workers and their family members, unauthorized immigration of various kinds will continue to present a challenge.

**Asylum rule change will result in denials of legitimate claims**

Current law requires that asylum seekers at the border assert a “credible fear” of persecution.<sup>1</sup> Asylum officers determine credibility based on whether there is a “significant possibility” that, if they allow the person to apply, an immigration judge would find that the fear is “well-founded,” a higher standard of proof. The credible fear interview screens out only the claims that obviously have “no possibility, or only a minimal or mere possibility, of success,” as U.S. Citizenship and Immigration Services (USCIS) puts it.<sup>2</sup> If the USCIS asylum officer rejects the claim as not credible, the applicant may ask an immigration judge to review the determination the next day but is not granted a full hearing. Customs and Border Protection removes those who fail to assert or fail to articulate a credible fear.

H.R. 391 would impose a much higher standard simply to apply for asylum in the United States. In addition to demonstrating that they had significant possibility of successfully proving their claim to an immigration judge, it would require applicants to prove that it is “more probable than

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\* The Cato Institute is a libertarian 501(c)(3) nonprofit think tank founded in 1977 and located in Washington D.C.

not” that their claims are true—a preponderance of the evidence standard.<sup>3</sup> This standard eviscerates the lower bar that Congress established. The committee simply cannot expect that asylum seekers who may have had to sneak out of their country of origin in the dead of night or swim across rivers to escape persecution will have sufficient evidence the moment they arrive in the United States to meet this burden.

In 2016, a group of Syrian Christians who traveled thousands of miles across multiple continents and then up through Mexico to get to the United States arrived at the border to apply for asylum.<sup>4</sup> Thankfully, they met the credible fear standard and were not deported, which enabled them to hire an attorney to help them lay out their claim, but this new standard could endanger anyone who follows their path. An inability to provide sufficient evidence of their religion, nationality, residence, or fear would result in deportation immediately after presenting themselves at the border.

The authors imply that requiring them to prove their statements are true is not the same as requiring them to prove their entire asylum case, but this is a distinction without a difference.<sup>5</sup> Asylum applicants must state a “credible fear” of persecution. Those statements would then be subject to the much more stringent standard. Of course the government should demand the truth from all applicants, but this is a question of the standard by which asylum officers should use to weed truth from falsehood. It is virtually impossible that, by words alone, asylum seekers could prove that it is “more probable than not” that their statements are true.

The committee should consider this fact: in 2016, immigration judges reversed nearly 30 percent of all denials of credible fear that came to them on appeal.<sup>6</sup> This means that even under the current law, asylum officers make errors that would reject people with credible claims of persecution. If Congress requires an even greater burden, many more such errors will occur, but faced with the higher evidentiary requirement, immigration judges will have little choice but to ratify them.

Here is another sign that the truth is not enough: asylum applicants with attorneys were half as likely to have their asylum denied by immigration judges in 2016 as those without attorneys. Indeed, 90 percent of all applicants without counsel lose their case, while a majority with counsel win theirs.<sup>7</sup> This demonstrates that people need more than just honesty—they also need to understand what evidence is relevant to their case and need help to gather documents, witnesses, and other evidence to support their claim.

For these reasons, Congress never intended the credible fear interview as a rigorous adversarial process because it wanted to give people who could credibly articulate a fear of persecution an opportunity to apply. It knew that while some people without legitimate claims would be able to apply, the lower standard of proof would protect vulnerable people from exclusion. As Senator Alan Simpson, the sponsor of the 1996 bill that created the credible fear process, “it is a significantly lesser fear standard than we use for any other provision.”<sup>8</sup> Indeed, during the debate over the compromise version of the bill, proponents of the legislation touted that the fact that they had dropped “the more probable than not” language in the original version.<sup>9</sup>

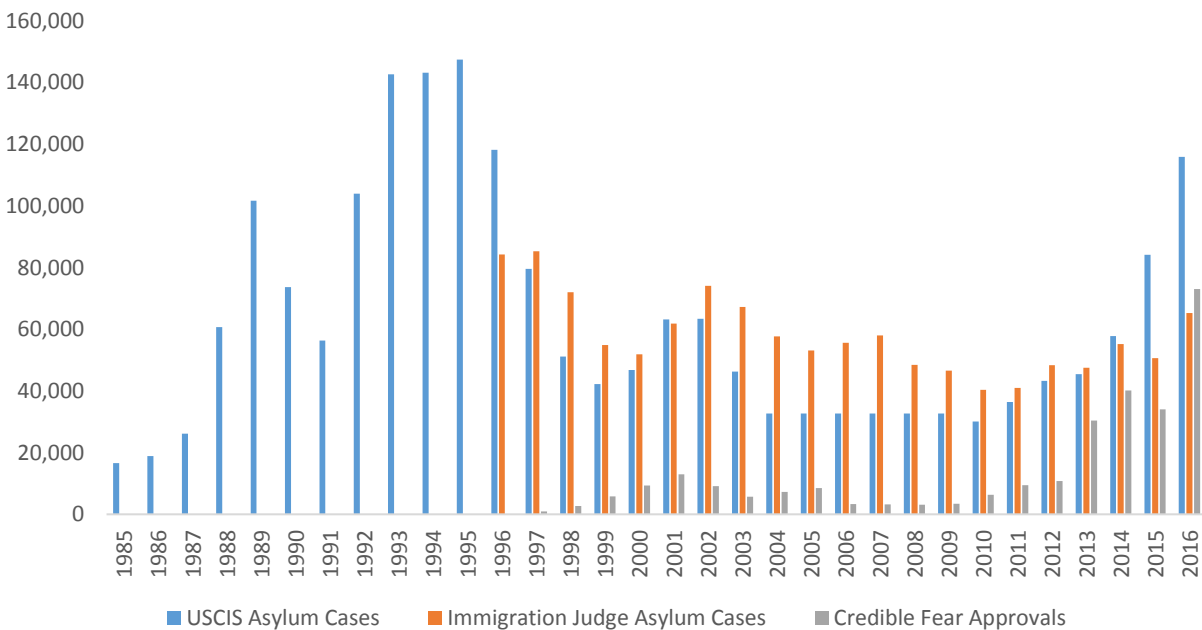
## Asylum surge is not unprecedented

People can either apply for asylum “affirmatively” to USCIS on their own or they can apply “defensively” after they come into the custody of the U.S. government somehow, such as at the border or airport, to an immigration judge, which would include the credible fear process. If USCIS denies an “affirmative” applicant who is in the country illegally, the government places them in removal proceedings before an immigration judge where they can present their claim again.

Reviewing the data on asylum claims, two facts become clear: total asylum claims peaked in the 1990s, and a substantial majority of claims are affirmative—that is, done voluntarily, not through the credible fear process or through removal proceedings. Although credible fear claims—a process that was first created in 1997—have increased dramatically, the overall number of asylum claims has still not reached the highs of the early 1990s. Unfortunately, the immigration courts have not published the number of cases that they received before 1996, but as Figure 1 shows, the United States has experienced similar surges of asylum seekers to 2016.<sup>10</sup>

**Figure 1**

### Asylum Applications Received and Credible Fear Claims Approved, 1985-2016

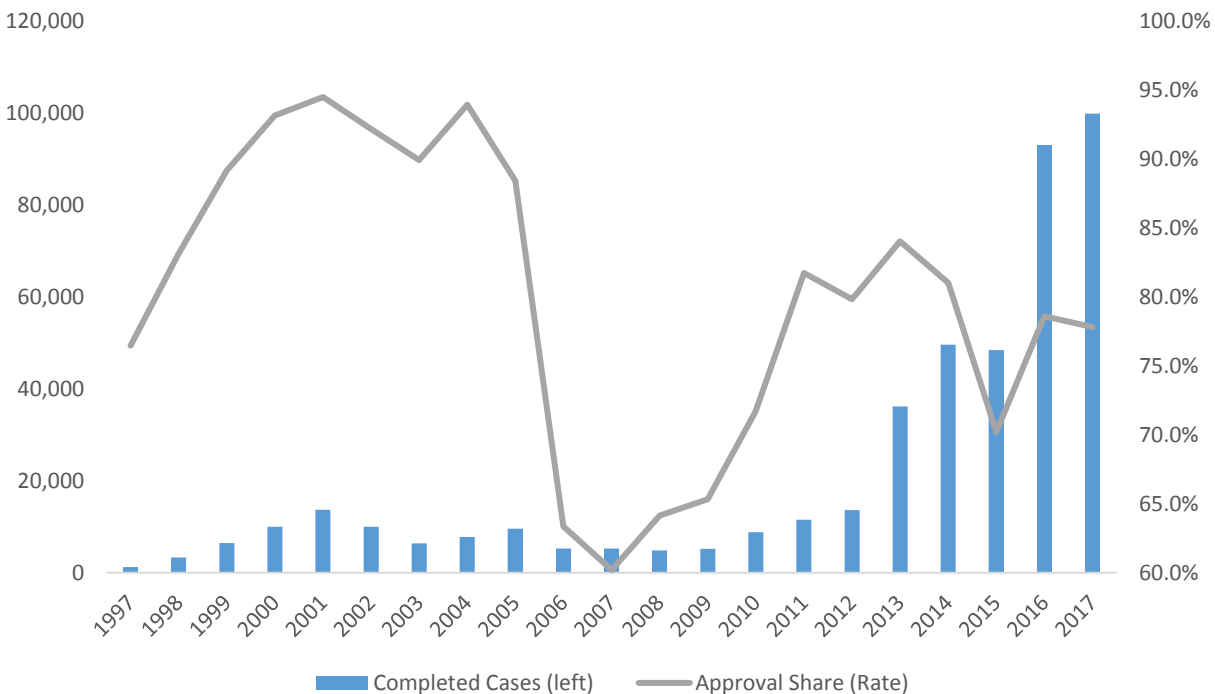


*Sources: Department of Justice; Department of Homeland Security, and U.S. Citizenship and Immigration Services*

It is noteworthy that in the midst of the surge in the 1990s, Congress did not adopt the draconian approach that this bill would require. Rather, it created the credible fear process that the bill would essentially eliminate. The authors of the legislation, however, argue that the Obama administration turned the credible fear process into a rubber stamp, allowing applicants to enter regardless of the credibility of their claims. But again a look at the numbers undermines this

narrative. As Figure 2 highlights, the Obama administration denied an average of about 25 percent of all asylum seekers from 2009 to 2016.<sup>11</sup>

**Figure 2**  
**Credible Fear of Persecution Claims, FY 1997 to 2017**



Sources: Rempell (1997-2008); USCIS (2009-2016)

Despite fluctuations of up to 35 percentage points during this time, there is simply no relationship at all between the rate of approval and the number of claims being made. Factors other than the approval rate must be driving the number of applications. Some of these claims are undoubtedly invalid or even fraudulent, but given that a majority of claims by individuals with representation in immigration court win their asylum claims, it is obvious that the credible fear process has protected many people from deportation to persecution abroad.<sup>12</sup>

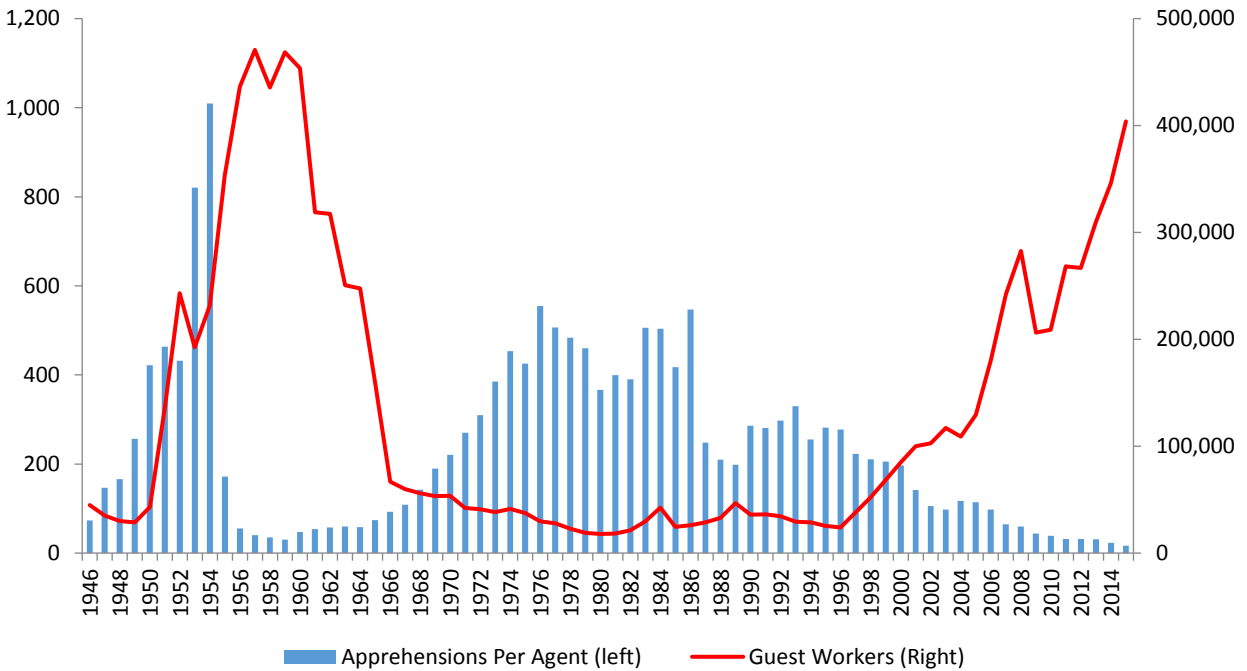
If fraudulent claims are a concern, Congress can best address it in the same way that it has successfully addressed other aspects of illegal immigration from Mexico: through an expansion of legal immigration. During the 1950s and again recently in the 2000s, Congress expanded the availability of low-skilled guest worker visas, which led to a great reduction in the rate of illegal immigration. Figure 3 presents the number of guest workers entering each year and the number of people each border agent apprehended each year—the best available measure of illegal immigration. It shows that the period of high illegal immigration occurred almost exclusively during the period of restrictive immigration.<sup>13</sup>

Most guest workers today are Mexicans.<sup>14</sup> This is largely due to the fact that the current guest worker programs are limited to seasonal temporary jobs and Mexico is closer to the United

States, which makes trips to and from the United States easier. By comparison, most asylum seekers are from Central America. Assuming that a significant portion of these asylum seekers are either reuniting with illegal residents already in the United States or are seeking illegal residence themselves, these seasonal programs are unavailable to them.

**Figure 3**

**Guest Worker Entries and Apprehensions of Illegal Aliens per Border Patrol Agent, 1946-2015**



*Sources: Border Patrol; Immigration and Naturalization Service; Department of Homeland Security*

Congress should create a temporary work visa program for low-skilled workers in year-round jobs, similar to the H-1B visa for high-skilled workers.<sup>15</sup> This would cut down on asylum fraud and illegal immigration without the downsides that this bill presents.

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<sup>1</sup> 8 U.S. Code § 1225

<sup>2</sup> U.S. Citizenship and Immigration Services, "Lesson Plan Overview - Credible Fear," February 28, 2014, <http://cmsny.org/wp-content/uploads/credible-fear-of-persecution-and-torture.pdf>.

<sup>3</sup> P. 2

Justia, "Evidentiary Standards and Burdens of Proof," <https://www.justia.com/trials-litigation/evidentiary-standards-burdens-proof/>

<sup>4</sup> Molly Hennessy-Fiske, "Who were the Syrians who showed up at the Texas border? Some are Christians," *Los Angeles Times*, December 7, 2015, <http://www.latimes.com/nation/la-na-syrian-texas-christians-20151207-story.html>

<sup>5</sup> "Markup of H.R. 1153, The Asylum Reform and Border Protection Act," House Judiciary Committee, March 4, 2015, <https://judiciary.house.gov/wp-content/uploads/2016/02/03.04.15-Markup-Transcript.pdf>.

<sup>6</sup> U.S. Department of Justice Executive Office for Immigration Review, "FY 2016 Statistics Yearbook," March 2017, <https://www.justice.gov/eoir/page/file/fysb16/download>.

<sup>7</sup> TracImmigration, "Continued Rise in Asylum Denial Rates," Syracuse University, December 13, 2016, <http://trac.syr.edu/immigration/reports/448/>.

<sup>8</sup> 142 Cong. Rec. S4492 (1996) <https://www.congress.gov/crec/1996/05/01/CREC-1996-05-01-pt1-PgS4457.pdf>

<sup>9</sup> 142 Cong. Rec. H11081 (1996) <https://www.congress.gov/crec/1996/09/25/CREC-1996-09-25-pt1-PgH11071-2.pdf><https://www.congress.gov/crec/1996/09/25/CREC-1996-09-25-pt1-PgH11071-2.pdf>

<sup>10</sup> U.S. Department of Justice Executive Office for Immigration Review, "Statistics Yearbook,"

<https://www.justice.gov/eoir/statistical-year-book>

Department of Homeland Security, "Yearbook of Immigration Statistics 2004,"

[https://www.dhs.gov/sites/default/files/publications/Yearbook\\_Immigration\\_Statistics\\_2004.pdf](https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2004.pdf)

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<sup>11</sup> U.S. Citizenship and Immigration Services Asylum Division, "Credible Fear Data,"

[https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-](https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-Credible_Fear_Workload_Report_Summary_POE_and_Inland_Caseload_through_2015-09.pdf)

[Credible\\_Fear\\_Workload\\_Report\\_Summary\\_POE\\_and\\_Inland\\_Caseload\\_through\\_2015-09.pdf](https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_CredibleFearReasonableFearStatisticsNationalityReport.pdf)

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[Credible\\_Fear\\_Workload\\_Report\\_Summary\\_POE\\_and\\_Inland\\_Caseload\\_through\\_2015-09.pdf](https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED-Credible_Fear_Workload_Report_Summary_POE_and_Inland_Caseload_through_2015-09.pdf)

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<sup>12</sup> <http://trac.syr.edu/immigration/reports/448/>

<sup>13</sup> Alex Nowrasteh, "Guest Worker Visas Can Halt Illegal Immigration," Cato Institute, May 5, 2014,

<https://www.cato.org/blog/guest-worker-visas-can-halt-illegal-immigration>.

<sup>14</sup> Alex Nowrasteh, "H-2B Expansion Doubles Down on Successful Border Control Strategy," Cato Institute,

December 23, 2015, <https://www.cato.org/blog/h-2b-expansion-doubles-down-successful-border-control-strategy>.

<sup>15</sup> Alex Nowrasteh, "How to Make Guest Worker Visas Work," Cato Institute Policy Analysis 719, January 31, 2013, <https://www.cato.org/publications/policy-analysis/how-make-guest-worker-visas-work>.